

Teaming & Joint Venture Agreements

Utah PTAC Procurement Symposium

October 11, 2017

A faint, light blue line-art illustration of a government building, likely a state capitol, serves as a background. It features a large central dome with a finial and a multi-story facade with numerous windows and columns.

Presentation Overview

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- Joint Ventures vs. Prime/Sub Teams
 - Joint Ventures
 - Size Requirements
 - JV Agreements
 - Prime/Subcontractor Teams
 - Teaming Agreements
 - Subcontracts
 - Subcontracting Limitations
- Questions & Discussion



Joint Ventures v. Teams

Joint Ventures v. Teams

Joint Ventures

- Both parties perform at the prime contract level
- Parties split profits and losses
- Parties often form a new legal entity
- Subcontracting limits apply to JV as a whole
- Both parties responsible for entire contract
- Agency must consider past performance of partners

Teams

- Only one party performs at the prime contract level
- Subcontractor typically paid on a pre-determined basis
- No new legal entity created
- Subcontracting limits apply to prime only
- Only prime responsible for entire contract
- Agency need not consider past performance of subcontractor

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Joint Ventures

Joint Ventures – Size

- Size Requirements:
 - In order for a joint venture to qualify as a small business, each member of the JV must be “small” under the size standard applicable to the solicitation

Joint Ventures – Size

- Aren't sizes added together?
 - Under prior law, the SBA often added the sizes of joint venture partners together to determine whether the JV was a small business
 - But effective June 30, 2016, the SBA will only look at whether each member of the JV, separately, exceeds the relevant size standard.

Joint Ventures – Size

- SBA-approved mentor and protégé may JV for “any” federal procurement for which the protégé qualifies as small.
 - SBA must pre-approve JV agreement for 8(a) contracts
 - JV can be formed under either 8(a) MP program or new All Small MP Program—no substantive difference
 - If mentor is large, JV agreement must meet requirements of 13 C.F.R. 124.513 for all contracts (8(a) and non-8(a))

Joint Ventures - Form

- New SBA rules effective Aug. 24, 2016, specify that all JVs:
 - Must be in writing and do business under its own name
 - Must be registered in SAM
 - Must be identified in SAM as a JV
 - If a “separate legal entity,” e.g., LLC, must be unpopulated
 - Administrative personnel allowed, but no employees who will perform scope of work

Joint Ventures – “3 in 2”

- The “3 in 2” rule:
 - If a JV entity is (1) awarded more than three contracts over a two-year period or (2) bids new work more than two years after its first award, the SBA may find the JV members affiliated for all purposes
 - 3 in 2 is an affiliation rule, not a hard limit on JV awards
 - Analysis is done as of time of bid, not time of award

Joint Ventures – “3 in 2”

- The “3 in 2” rule:
 - Rule is very easily circumvented: just form a new joint venture entity
 - Rule is specific to a joint venture entity, not the joint venture partners
 - *Size Appeal of Quality Services International, Inc.*, SBA No. SIZ-5599 (2014):
 - Over four-year period, partners formed 8 JVs and were awarded 15 contracts
 - No three-in-two violation because none of the JVs received more than three contracts over a two year period

Joint Ventures – Agreements

- All JVs must adopt written agreements, but many JVs must include certain mandatory provisions in their JV agreements
- Required provisions vary based on socioeconomic status of the solicitation the JV is pursuing

Joint Ventures – Agreements

- If the JV will pursue a small business set-aside:
 - If all JV partners are small businesses, the JV need not include any specific terms (but still must be in writing)
 - Contrary to common misconception, a mentor-protégé agreement is not required if both parties are small
 - If the JV is a mentor-protégé JV under SBA 8(a) or “All Small” M/P program, the parties must adopt a JV agreement meeting requirements of 13 C.F.R. 125.8

Joint Ventures – Agreements

- If the JV will pursue a socioeconomic contract (8(a), SDVOSB, HUBZone, or WOSB):
 - JV agreement must meet all requirements specified in appropriate SBA regulation
 - Five separate regulations; choose based on socioeconomic status of solicitation
 - Fortunately, regulations are almost (but not 100%) identical following 2016 changes

Joint Ventures – Agreements

- Mandatory JV provisions include (but are not limited to):
 - Certified company must be Managing Venturer
 - Certified companies must own at least 51%
 - Employee of certified company must be Project Manager
 - Profits must be split according to work share
 - “Special” bank account must be created
 - Many others
- Essential to get it right: one missing or incorrect provision can render the JV ineligible

Joint Ventures – Agreements

- 8(a) JV Agreements
 - 8(a) JV agreements must be approved by the SBA prior to award of an 8(a) contract
 - SBA approval not required for non-8(a) contracts, but JV must meet 8(a) requirements to use 8(a) M/P exception from affiliation
 - In addition to JV agreement, parties will be required to submit documentation (e.g., tax returns)
 - Bottom line: 8(a) JVs can take a lot of work to form, so start early (and get help if you need it)
- VA SDVOSB/VOSB JV Agreements must be approved by VA CVE before date of initial offer

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Prime/Subcontractor Teams

Teaming Agreements

- Teaming Agreement: binding agreement to pursue a specific government contract as a prime/sub team.
- FAR does not require a teaming agreement
 - Procuring agencies sometimes require them
 - Proposed SBA rules would have required teaming agreements in certain settings, but SBA ultimately elected not to require teaming agreements
- Prime/sub teams usually may be formed without formal teaming agreements

Teaming Agreements

- Why use a written teaming agreement?
 - “Lock in” commitments from prospective teammates
 - Demonstrate teammates’ commitment to each other and project
 - Avoid difficult post-award disputes
 - Demonstrate compliance with key requirements
 - Limitation on subcontracting
 - Ostensible subcontractor rule

Teaming Agreements

- A teaming agreement should usually include:
 - Exclusivity provision
 - Usually, but not always applicable
 - Ensures that subcontractor will not work with any other prime contractors for the procurement and that prime will obtain certain scope from the subcontractor
 - Be careful not to draft overly restrictive provisions that could run afoul of prohibition on restrictions of subcontractor sales to the government

Teaming Agreements

- A teaming agreement should usually include:
 - Division of proposal responsibilities
 - Prime usually plays the lead role
 - Subcontractor's role usually limited to its own scope and pricing
 - Parties typically agree to “go Dutch”—each party covers its own proposal-writing expenses

Teaming Agreements

- A teaming agreement should usually include:
 - Subcontract provisions
 - Guaranteed award?
 - Terms of subcontract?
 - Negotiation period (potentially renders teaming agreement unenforceable)?

Teaming Agreements

- A teaming agreement should usually include:
 - Non-Disclosure Provisions
 - May be encompassed in a separate non-disclosure agreement
 - If so, teaming agreement should refer to NDA
 - A fair teaming agreement equally ensures the protection of both parties' confidential information
 - Be wary of prospective teammates suggesting one-sided non-disclosure provisions

Subcontracts

- Subcontract supersedes/replaces the teaming agreement
- Much more detailed than teaming agreement
- Must include mandatory FAR provisions (flow-downs)
 - Essentially required (can't flow down terms orally or by handshake)

Subcontracts

In addition to required flow-downs and SBA mandates, a government subcontract should usually include:

- Subcontractor's scope of work
- Payment and invoicing provisions
- Basis of payment (e.g., fixed-price, T&M)

Subcontracts

- A government subcontract should usually include:
 - Pass through dispute resolution
 - Without it, subcontractor cannot make claims against government
 - Termination provisions
 - May subcontract be terminated for convenience?
 - What are prime (and sub) default rights?

Subcontracts

- A government subcontract should usually include:
 - Incorporation by reference clause
 - Consider express flow-down of key FAR clauses
 - Lower-tier subcontracting provisions
 - Must prime approve?

Subcontracts

- A government subcontract should usually include:
 - Non-disclosure provisions (if no separate NDA)
 - Ensured compliance with subcontracting limits (if prime contract is set-aside)
 - Term of subcontract
 - How will prime contract options be addressed?

Subcontracts

- A government subcontract should usually include:
 - Representations and certifications
 - Conflicts of interest
 - Compliance with laws
 - Suspension/debarment
 - Others

Questions?

Thank you!

Questions?



For More Information

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